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Supreme Court of the United States

October Term—1931

No. 514

D. B. HEINER, *Collector of Internal Revenue, 23rd District of Pennsylvania,*

v.

JOHN H. DONNAN, SIDNEY B. DONNAN, ALVAN E. DONNAN, *et al.*

Motion of Continental Illinois Bank & Trust Company, as Executor of the Estate of John J. Mitchell, Deceased, et al, For Leave to File Brief as Amici Curiae, and Brief of Amici Curiae.

E. F. COLLADAY,
WILTON H. WALLACE,
Attorneys for Continental Illinois Bank & Trust Co., et al, as Amici Curiae.
1331-1333 G Street, N. W.,
Washington, D. C.

DAVID O. DUNBAR,
CLINTON MERRICK,
JAMES O. MOORE,
Of Counsel.

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

May it please the Court:

The undersigned, as counsel for

Continental Illinois Bank & Trust Company, Executor of the Estate of John J. Mitchell, Deceased,

Northern Trust Company, et al, Executors of the Estate of George A. Thorne, Deceased.

Sigmond Bock and Benjamin S. Gunzberg, as Administrators of the Estate of Mayer Wile, Deceased, and

Robert E. Hunter, et al, Executors of the Estate of Edward S. Hunter, Deceased,

move this Honorable Court for leave to file the accompanying brief in this case as amici curiae.

E. F. COLLADAY,
WILTON H. WALLACE,
Attorneys for Amici Curiae.

DAVID O. DUNBAR,
CLINTON MERRICK,
JAMES O. MOORE,
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D. B. HEINER, *Collector of Internal Revenue, 23rd District of Pennsylvania,*

v.

JOHN H. DONNAN, SIDNEY B. DONNAN, ALVAN E. DONNAN, *et al.*

Brief of Continental Illinois Bank & Trust Company, as Executor of the Estate of John J. Mitchell, Deceased, et al., as Amici Curiae.

PRELIMINARY STATEMENT

Each of the persons, on whose behalf as amici curiae the instant brief is filed, now has in litigation before a district court of the United States, the Court of Claims of the United States, or the United States Board of Tax Appeals a case in

which there has been raised the question of the constitutionality of the second sentence of section 302(c) of the Revenue Act of 1926. In each of said cases the taxpayer has paid or has had asserted against him a deficiency in Federal estate taxes, and the pending legal proceedings have been brought either for the recovery of the deficiency, where same has been paid, or for the purpose of contesting the asserted additional tax, where same has not been paid. Since said additional taxes are not due if the second sentence of section 302(c) is unconstitutional, it is apparent each person herein has a direct interest in the decision to be rendered on this appeal.

It is the position of the amici curiae herein that said portion of section 302(c) of the Revenue Act of 1926 is unconstitutional, being in conflict with the provisions of the Fifth Amendment to the Constitution of the United States.

ARGUMENT

POINT I.

The second sentence of section 302(c) of the Revenue Act of 1926 deprives the taxpayer of his property without due process of law, in violation of the Fifth Amendment, and is therefore unconstitutional.

The specific point here involved is whether Congress acted within its constitutional authority in

enacting a revenue statute which taxes the transfer of property made "in contemplation of death" and which then provides that a transfer of property made by a decedent within two years prior to his death and without an adequate and full consideration, "shall be deemed and held to have been made in contemplation of death within the meaning of this title." By the quoted provisions of the statute Congress endeavors to create a conclusive presumption that transfers made within two years of death are made in contemplation thereof, without regard to the real facts in the case; and a taxpayer is thereby deprived of his right to submit factual proof that the motivating influence for the transfer, as is often the case, was something other than "contemplation of death."

The relevant provisions of section 302(c) of the 1926 Act differ materially from their predecessors in that the earlier Acts created a rebuttable, not a conclusive, presumption that transfers made within two years of death were made in contemplation thereof. In enacting said section of the 1926 Act, Congress has endeavored to substitute mere legislative fiat for fact in the determination of an issue involving property, which thing, we submit, it is without authority to do. For the purpose of regulating the presentation of evidence or even for the purpose of minimizing the administrative difficulties of enforcing a revenue statute, Congress might well have created a legislative presumption or inference of liability, thereby casting upon the taxpayer the duty of producing some evidence to

the contrary; but it could not deny to the taxpayer the right to present his defense to the liability thus presumed. As said by the Supreme Court in *Mobile, etc. R. R. v. Turnipseed, Administrator*, 219 U. S. 35, 43:

> "That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, *it must not*, under guise of regulating the presentation of evidence, *operate to preclude the party from the right to present his defense to the main fact thus presumed.*" (Italics ours.)

In those cases falling within section 302(c) of the 1926 Act, there is no rational connection between the fact proved, viz: an actual transfer within two years of death, and the ultimate fact presumed, viz: that it was made in contemplation of death. For instance; a father might present a wedding gift to his daughter and if within two years he should die, his executors would be called upon to pay a tax upon the wedding gift under the theory that it was made "in contemplation of death". *This actual state of facts, involving a*

wedding gift and the accidental death of the donor in an automobile collision within two years, exists in a case now in litigation in the United States District Court, Northern District of Illinois, Eastern Division, entitled CONTINENTAL ILLINOIS BANK & TRUST CO., ET AL, EXECUTORS OF LAST WILL AND TESTAMENT OF JOHN J. MITCHELL, DECEASED, V. UNITED STATES OF AMERICA. The plaintiff in that case is one of the amici curiae in whose behalf this brief is filed.

It is thus apparent, we submit, that the conclusive presumption of section 2(c), to use the phraseology of the Turnipseed case, supra, is "so unreasonable as to be a purely arbitrary mandate", and as such is invalid.

When in a later case, *Manley vs. Georgia*, 279 U. S. 1, the Supreme Court again had occasion to consider the nature of presumptions, it reiterated the position previously taken in the Turnipseed case, supra, and speaking through Mr. Justice Butler, who wrote for the court, said (pp. 5-6):

> "State legislation declaring that proof of one fact or a group of facts shall constitute prima facie evidence of the main or ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred. *If the presumption* is not unreasonable and *is not made conclusive* of the rights of the person against whom raised, *it does not constitute a denial*

of due process of law. Mobile J. & K. C. R. R. v. Turnipseed, 219 U. S. 35, 43. A prima facie presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. *Bailey v. Alabama*, 219 U. S. 219, 233, *et seq.* Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property. '* * * it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.'" (Citing cases.) (Italics ours.)

But in considering the issue here before the court, it hardly seems necessary, in examining the authorities, to go beyond the decision of this court in *Schlesinger, et al, Executors v. Wisconsin, et al*, 270 U. S. 230. That case, which arose under the Wisconsin revenue statutes, we believe to be controlling. Except for the fact that a state rather than a federal statute was involved and that the specified period of the presumption was six rather than two years, the Schlesinger case presented issues identical with those now before this Court. In holding the Wisconsin statute invalid because in conflict with the Fourteenth Amendment, the

Court, through Mr. Justice McReynolds who wrote the majority opinion, said (p. 239-240):

"The challenged enactment plainly undertakes to raise a conclusive presumption that all material gifts within six years of death were made in anticipation of it and to lay a graduated inheritance tax upon them without regard to the actual intent. The presumption is declared to be conclusive and cannot be overcome by evidence. It is no mere prima facie presumption of fact.

"The court below declared that a tax on gifts inter vivos only could not be so laid as to hit those made within six years of the donor's death and exempt all others—this would be 'wholly arbitrary.' We agree with this view and are of opinion that such a classification would be in plain conflict with the Fourteenth Amendment. The legislative action here challenged is no less arbitrary. Gifts inter vivos within six years of death, but in fact made without contemplation thereof, are first conclusively presumed to have been so made without regard to actualities, while like gifts at other times are not thus treated. There is no adequate basis for this distinction. Secondly, they are subjected to graduated taxes which could not properly be laid on all gifts or, indeed, upon any gift without testamentary character.

> "The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, 'A' may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against 'B'. Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever."

The differences between the Schlesinger case, supra, and that now before the court, referred to above, are not material in so far as substance is concerned. The court's opinion in the Schlesinger case makes no point of the fact that the period of presumption is six years rather than a shorter time; but makes it clear that the challenged enactment is invalid because it creates a conclusive presumption "without regard to actualities." Likewise the federal statute creates a conclusive presumption without regard to actualities, and it can make no difference that the period of presumption is two rather than six years. In either event the taxpayer is deprived of his right to show what the real facts are. It is the denial of this right that vitiates the statute.

It was so held by the Kentucky Court of Appeals in *State Tax Commission v. Robinson's Executor, et al*, 234 Ky. 415, in which a Kentucky statute was held invalid which provided that transfers of property made within *three* years next before the donor's death shall be presumed to have been made in contemplation of death. There the court held that the State may not fix an arbitrary time before death in which transfers shall be presumed to have been so made.

Nor does it make a difference that the decided case involved a state statute falling within the prohibition of the due process clause of the Fourteenth Amendment, whereas, the enactment now questioned is a federal statute alleged to fall within the prohibition of the Fifth Amendment; for "due process of law" has exactly the same meaning in each of said Amendments: *U. S. v. Armstrong*, 265 Fed. 683. And it has been further held that the due process clause of the Fifth Amendment is broad enough in scope to include the "equal protection of the law" under the Fourteenth Amendment: *U. S. v. Yount*, 267 Fed. 861. With reference to this particular matter the Supreme Court has more recently said in *Bromley v. McCaughn, Collector*, 280 U. S. 124, 138, 139:

> "* * * Graduated taxes on inheritances or successions, with provisions for exemptions, have so often been upheld as not violating either the due process or the equal protection clauses of the Fourteenth

> Amendment, *Stebbins v. Riley*, 268 U. S. 137, as to leave little ground for supposing that taxation by Congress embracing these features, and otherwise valid, could be deemed a denial of the due process clause of the Fifth. See *Van Oster v. Kansas*, 272 U. S. 465, 468."

The position taken by the Supreme Court in the Schlesinger case, supra, was again affirmed in *Uihlein v. Wisconsin*, 273 U. S. 642.

Also in *Hoeper v. Tax Commission of Wisconsin*, 76 L. ed. 145 (decided by the Supreme Court November 30, 1931), this court was asked to, and did, declare unconstitutional a state statute which, as interpreted and applied, deprived the taxpayer of due process and of the equal protection of the law. In denying the appellee's contention that a certain classification of taxpayers was necessary to prevent frauds and evasions, the court, speaking through Mr. Justice Roberts and relying upon the Schlesinger case, said (p. 148):

> "The claimed necessity cannot justify the otherwise unconstitutional exaction."

That very portion of section 302(c) of the 1926 Act which now is challenged has been passed upon by four District Courts of the United States and by the United States Board of Tax Appeals. *Without exception said statute has been declared unconstitutional in each instance:*

Donnan, et al. v. Heiner, Collector, 48 Fed. (2d) 1058 (Now before the United States Supreme Court on Certificate from C. C. A. 3rd).

Delaware Trust Co. v. Handy, Collector, 51 Fed. (2d) 867 (Now before the United States Supreme Court on Certificate from C. C. A. 3rd).

Hall. et al, v. White, Collector, 48 Fed. (2d) 1060 (Affirmed by C. C. A. 1st in 53 Fed. 2d) 210, and now before the United States Supreme Court on petition for writ of certiorari).

Guinzberg, et al. v. Anderson, Collector, 51 Fed. 2d) 592 (Affirmed by C. C. A. 2nd 12-7-31 (not yet reported) and now before the United States Supreme Court on petition for writ of certiorari).

American Security & Trust Co. et al. v. Commissioner of Internal Revenue, 24 B. T. A. 334.

But it has been suggested that the exaction here challenged can be sustained under the authority of *Bromley v. McCaughn*, 280 U. S. 124, as a tax upon gifts inter vivos. This very argument was presented to the Court in the *Guinzberg case, supra*, and in ruling thereon the court said that the Government's argument (p. 593)

"is not only not borne out by the language

of the section, but is thoroughly unsound. Under the statute: (a) The Gift is included in the estate at the value at the date of death irrespective of the value at the time of receipt; (b) the amount of the tax is not based on the gift itself but on the value of the entire net estate; and (c) the tax falls upon the interest of the beneficiaries in the estate, and not upon the donee, unless the estate is inadequate. I do not think, therefore, there is any possible justification for upholding the tax as a gift tax."

Furthermore, it should be noted that the tax in question is imposed by "Title III—Estate Tax" of the Revenue Act of 1926 and is therefore imposed specifically as an estate tax and not as a gift tax. Section 1200 of the Revenue Act of 1926 repeals, as of January 1, 1926, "Part II of Title III (called 'Gift Tax')" of the Revenue Act of 1924. Since Congress by the Revenue Act of 1926, being the very act which for the first time creates the conclusive presumption now in controversy, specifically and definitely repealed the gift tax which had been asserted by the Revenue Act of 1924, it cannot by any theory be said to have imposed a gift tax by adopting said section 302(c) of the Revenue Act of 1926. By said repeal Congress manifested a clear intention to eliminate gift taxes, and we submit that it succeeded in so doing.

CONCLUSION

It is respectfully submitted that the second sentence of section 302(c) of the Revenue Act of 1926 deprives the taxpayer of property without due process of law, in violation of the Fifth Amendment and is therefore unconstitutional and void.

Respectfully submitted,

E. F. COLLADAY,
WILTON H. WALLACE,
Attorneys for Continental Illinois Bank & Trust Company, Executor, et al., as Amici Curiae.

1331-1333 G Street, N. W.,
Washington, D. C.

DAVID O. DUNBAR,
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